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U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

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PETITION TO ACCEPT UNINTENTIONALLY DELAYED PAYMENT OF MAINTENANCE FEE IN AN EXPIRED PATENT (37 CFR 1.378 (c))

Docket Number (Optional)

75095
05/13/2010 DALLIN 00000012 6945911

Mail to: Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450
Fax: (571) 273-8300

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MAY 18 2010

OFFICE OF PETITIONS

NOTE: If information or assistance is needed in completing this form, please contact Petitions Information at (571) 272-3282.

Patent No. 6945911 Application Number 09903791

Issue Date 09/20/2005 Filing Date 07/12/2001

CAUTION: Maintenance fee (and surcharge, if any) payment must correctly identify: (1) the patent number (or reissue patent number, if a reissue) and (2) the application number of the actual U.S. application (or reissue application) leading to issuance of that patent to ensure the fee(s) is/are associated with the correct patent. 37 CFR 1.366(c) and (d).

Also complete the following information, if applicable

The above – identified patent

☐ Is a reissue of original Patent No. _____ original issue date _____
original application number _____
original filing date _____

☐ resulted from the entry into the U.S. under 35 U.S.C. 371 of international application _____
filed on _____

CERTIFICATE OF MAILING (37 CFR 1.89(a))

I hereby certify that this paper (*along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service on the date shown below with sufficient postage as first class main in an envelope addressed to Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, or facsimile transmitted to the U.S. Patent and Trademark Office on the date shown below.

May 6, 2010
Date

Amy Edelstein
Signature

Amy Edelstein
Typed or Printed Name of Person Signing Certificate

This collection of information is required by 37 CFR 1.378(c). The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 1 hour to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, Virginia 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

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1. SMALL ENTITY

☒ Patentee claims, or has previously claimed, small entity status. See 37 CFR 1.27.

2. LOSS OF ENTITLEMENT TO SMALL ENTITY STATUS

☐ Patentee is no longer entitled to small entity status. See 37 CFR 1.27(g)

3. MAINTENANCE FEE (37 CFR 1.20(e)-(g))

The appropriate maintenance fee must be submitted with this petition, unless it was paid earlier.

NOT Small Entity			Small Entity		
Amount	Fee	(Code)	Amount	Fee	(Code)
<input type="checkbox"/> \$ _____	3 ½ yr fee	(1551)	<input checked="" type="checkbox"/> \$ 490.00	3 ½ yr fee	(2551)
<input type="checkbox"/> \$ _____	7 ½ yr fee	(1552)	<input type="checkbox"/> \$ _____	7 ½ yr fee	(2552)
<input type="checkbox"/> \$ _____	11 ½ yr fee	(1553)	<input type="checkbox"/> \$ _____	11 ½ yr fee	(2553)

MAINTENANCE FEE BEING SUBMITTED \$ 0

4. SURCHARGE

The surcharge required by 37 CFR 1.20(i)(2) of \$ \$1640.00-\$700.00 (Fee Code 1558) must be paid as a condition of accepting unintentionally delayed payment of a maintenance fee.SURCHARGE FEE BEING SUBMITTED \$ 940.00

5. MANNER OF PAYMENT

☐ Enclosed is a check for the sum of \$ _____☐ Please charge Deposit Account No. _____ the sum of \$ _____☒ Payment by credit card. Form PTO-2038 is attached.

6. AUTHORIZATION TO CHARGE ANY FEE DEFICIENCY

☒ The Director is hereby authorized to charge any maintenance fee, surcharge or petition deficiency to Deposit Account No. 03-2465

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7. OVERPAYMENT

As to any overpayment made please

OR

Credit to Deposit Account No. 03-2465

Send refund check

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WARNING:

Petitioner/applicant is cautioned to avoid submitting personal information in documents filed in a patent application that may contribute to identity theft. Personal information such as social security numbers, bank account numbers, or credit card numbers (other than a check or credit card authorization form PTO-2038 submitted for payment purposes) is never required by the USPTO to support a petition or an application. If this type of personal information is included in documents submitted to the USPTO, petitioners/applicants should consider redacting such personal information from the documents before submitting them to the USPTO. Petitioner/applicant is advised that the record of a patent application is available to the public after publication of the application (unless a non-publication request in compliance with 37 CFR 1.213(a) is made in the application or issuance of a patent. Furthermore, the record from an abandoned application may also be available to the public if the application is referenced in a published application or an issued patent (see 37 CFR 1.14). Checks and credit card authorization forms PTO-2038 submitted for payment purposes are not retained in the application file and therefore are not publicly available.

8. STATEMENT

The delay in payment of the maintenance fee to this patent was unintentional.

9. PETITIONER(S) REQUEST THAT THE DELAYED PAYMENT OF THE MAINTENANCE FEE BE ACCEPTED AND THE PATENT REINSTATED

D. Ranft

Signature(s) of Petitioner(s)

5-6-10

Date

Donald J. Ranft

Typed or printed name(s)

53501

Registration Number, if applicable

(914) 941-5668

Telephone Number

COLLEN IP, Intellectual Property Law, P.C., 80 South Highland Avenue

Address

Ossining, NY 10562

Address

37 CFR 1.378(d) states: "Any petition under this section must be signed by an attorney or agent registered to practice before the Patent and Trademark Office, or by the patentee, the assignee, or other party in interest."

ENCLOSURES

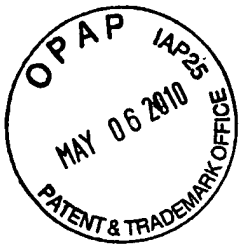


Maintenance Fee Payment



Surcharge under 37 CFR 1.20(i)(2) (fee for filing the maintenance fee petition)





ATTORNEY DOCKET NO: 75095

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Patentee : Edward Jackowski
Patent No. : 6945911
Issued : September 20, 2005
For : System and Method for Prescribing Fitness
Art Unit :
Examiner :

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OFFICE OF PETITIONS

Dated : May 6, 2010

Hon. Commissioner of Patents
P. O. Box 1450
Alexandria, Va. 22313-1450

PETITION TO ACCEPT UNINTENTIONALLY DELAYED PAYMENT OF MAINTENANCE FEE

Applicant failed to pay the required Maintenance Fee for the above identified Patent within the required time period. Application then filed a Petition under 37 CFR 1.378(b) on October 29, 2009. A copy of the Dismissed Petition is enclosed. Applicant is submitting Petition under 37 CFR 1.378(c). The Maintenance Fee was previously submitted with Applicant's first Petition along with the \$700 fee required for Petition under 37 CFR 1.378(b). Thus Applicant is now paying an additional \$940 (plus \$700 previously paid) for this Petition under 37 CFR 1.378(c).

Enclosed are the following:

1. Petition under 37 CFR 1.378(c);
2. Copy of Decision on Petition under 37CFR 1.378(b)
3. Credit card authorization for \$940

If there are any issues or questions concerning the Petition, please contact the undersigned at (914) 941-5668.

Respectfully submitted
for Applicant,

By: *Donald J. Ranft*
Donald J. Ranft
Reg. No. 53,501

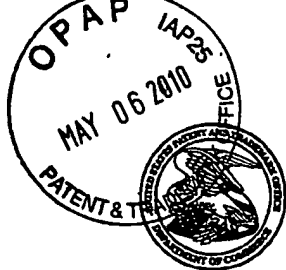
DJR:ae
COLLEN /P
The Holyoke-Manhattan Building
80 South Highland Avenue
Ossining, New York 10562
(914) 941-5668

SHOULD ANY OTHER FEE BE REQUIRED, THE PATENT AND TRADEMARK OFFICE IS HEREBY REQUESTED TO CHARGE SUCH FEE TO OUR DEPOSIT ACCOUNT 03-2465.

I HEREBY CERTIFY THAT THIS CORRESPONDENCE IS BEING DEPOSITED WITH THE UNITED STATES POSTAL SERVICE AS EXPRESS MAIL IN AN ENVELOPE ADDRESSED TO: Mail Stop Petitions; COMMISSIONER FOR PATENTS, PO Box 1450, Alexandria, Virginia 22313-1450

BY: Amy Edelstein
Amy Edelstein

DATE: May 6, 2010



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

COLLEN LAW ASSOCIATES, P.C.
THE HOLYOKE - MANHATTAN BUILDING
80 SOUTH HIGHLAND AVENUE
OSSINING NY 10562

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In re Patent No. 6,945,911
Issue Date: September 20, 2005
Application No. 09/903,791
Filed: July 12, 2001
Patentee(s): Edward Jackowski

DECISION ON PETITION
UNDER 37 CFR 1.378(b) OFFICE OF PETITIONS

MAY 18 2010

This is a decision on the petition under 37 CFR 1.378(b), filed October 29, 2009, to accept an unavoidably delayed payment of a maintenance fee for the above-identified patent.

The petition is **DISMISSED**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). **Any such petition for reconsideration must be accompanied by the petition fee of \$400 as set forth in 37 CFR 1.17(f).** The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted below, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Director.

The patent issued September 20, 2005. The first maintenance fee could have been paid from September 22, 2009, through March 22, 2009, or with a surcharge during the period from March 23, 2009 through September 20, 2009. Accordingly, the patent expired after midnight September 20, 2009, for failure to timely submit the first maintenance fee.

A petition to accept the delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by (1) an adequate showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent, (2) payment of the appropriate maintenance fee, unless previously submitted, and (3) payment of the surcharge set forth in 37 CFR 1.20(i)(1).

This petition lacks item (1) above.

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The Director may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Director to have been "unavoidable". 35 U.S.C. § 41(c)(1).

Petitioner states that the delay in payment of the maintenance fees was unavoidable because of the physical infirmities of his bookkeeper at the time.

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.378(b)(3).

Acceptance of late payment of a maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. § 133 because 35 U.S.C. § 41(c)(1) uses the identical language, i.e. "unavoidable delay". Ray v. Lehman, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995)(quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)). Decisions on reviving abandoned applications have adopted the "reasonably prudent person" standard in determining if the delay in responding to an Office action was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-515 (D.C. Cir. 1912); and Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141. In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

In essence, petitioner must show that patentee was aware of the need to pay the maintenance fee, and to that end was tracking it, or had engaged someone to track it before the expiration, but when the fee came due, was "unavoidably" prevented from making the maintenance fee payment until the petition was filed.

In determining whether a delay in paying a maintenance fee was unavoidable, one looks to whether the party responsible for payment of the maintenance fee exercised the due care of a reasonably prudent person. Ray, 55 F3d at 608-609, 34 USPQ2D at 1787. It is incumbent upon the patent owner to implement steps to schedule and pay the fee, or obligate another to do so. See California Medical Products v. Technol. Med. Prod., 921 F.Supp 1219, 1259 (D. Del. 1995). That is, 37 CFR 1.378(b)(3) requires a showing of the steps in place to pay the maintenance fee.

Petitioner indicates that his bookkeeper paid all of his corporate and personal bills; however, due to bookkeeper's untimely illness, petitioner was unable to timely pay his maintenance fee.

As the patentee at the time of expiration, it was incumbent on petitioner to have this patent docketed for payment of the maintenance fee in a reliable system as would be employed by a prudent and careful person with respect to his most important business, or to have engaged another for that purpose. See California Medical Products v. Technol Med. Prod., 921 F.Supp. 1219, 1259 (D.Del. 1995). Even where, as here, another has been relied upon to pay the maintenance fees, such asserted reliance *per se* does not provide a petitioner with a showing of unavoidable delay within the meaning of 37 CFR § 1.378(b) and 35 USC § 41(c). Rather, such reliance merely shifts the focus of the inquiry from the petitioner to whether the obligated party acted reasonably and prudently. Nevertheless, a petitioner is bound by any errors that may have been committed by the obligated party.

As 35 USC § 41(b) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 USC § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees. Ray, 55 F.3d at 609, 34 USPQ2d at 1788. Since petitioner does not provide a showing that he or his bookkeeper had in fact been tracking the maintenance fee due dates with a reliable tracking system, such as would be used by prudent and careful men in relation to their most important business, petitioner cannot reasonably show that the delay was unavoidable delay. In re Katrapat, 6 USPQ2d 1863, 1867-1868 (Comm'r Pat. 1988); California, *supra*. Put otherwise, the issues of health problems are immaterial in the absence of a showing that this, and not the lack of any steps in place to pay the fee, caused or contributed to the delay.

Since petitioner has not shown to the satisfaction of the Director that the delay in paying the maintenance fee was unavoidable, the petition cannot be granted at this time.

Petitioner should note that if this petition is not renewed or if renewed and not granted, then the maintenance fee and post expiration surcharge are refundable. See 37 CFR 1.378(e) and such may be obtained by written request from the Office of Finance, Refund Section, at the USPTO address above.

Petitioner should also note that since the maintenance fee was proffered within 24 months of the date of expiration date of the patent, he has an alternate remedy under the unintentional provisions of 37 CFR 1.378(c) which does not require a showing of the delay in timely paying the maintenance fee in order to reinstate the patent. The \$700 already submitted would be applied to the \$1,640 fee owed under 37 CFR 1.378(c), leaving a balance due of \$940.

Lastly, it is noted that the petition is signed by the inventor, Edward Jackowski; however, petitioner has appointed a representative to conduct all business before the U.S. Patent and Trademark Office (Office). The Office does not engage in dual correspondence with petitioner and petitioner's representative. If petitioner no longer wishes to be represented by the representative of record, then a revocation of the power of attorney or patent agent should be submitted. Petitioner is advised that the mere filing of a power of attorney

and/or a change of correspondence address will not affect the fee address. Therefore, if petitioner desires to receive future correspondence regarding any Maintenance Fee Reminder which may be mailed regarding maintenance fees for the above-identified patent, a "Fee Address" Indication Form (see PTO/SB/47) and Request for Customer Number (see PTO/SB/125) must also be submitted. A courtesy copy of this decision is being mailed to the petitioner herein; however, all future correspondence regarding this patent will be directed solely to the above-noted correspondence address of record.

Further correspondence with respect to this matter should be delivered through one of the following mediums:

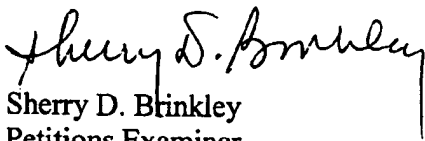
By mail: Mail Stop PETITIONS
 Commissioner for Patents
 Post Office Box 1450
 Alexandria, VA 22313-1450

By hand: Customer Service Window
 Mail Stop Petitions
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

By fax: (571) 273-8300
 ATTN: Office of Petitions

By Internet: EFS-Web¹

Any questions concerning this matter may be directed to the undersigned at (571) 272-3204.



Sherry D. Brinkley
Petitions Examiner
Office of Petitions

cc: EDWARD JACKOWSKI, Ph.D.
 28 CENTER AVENUE, UNIT 2
 NORWALK, CT 06851

¹ www.uspto.gov/ebc/efs_help.html (for help using EFS-Web call the Patent Electronic Business Center at (866) 217-9197)